

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSALIND SMITH	:	CIVIL ACTION
	:	
v.	:	
	:	
PSI SERVICES II INC., TROY	:	
HUGHES, AND JOHN DOES 1-10,	:	
J/S/I	:	NO. 97-6749

M E M O R A N D U M

WALDMAN, J.

January 12, 2001

This is a Title VII case. Plaintiff claimed that she was subject to a sexually hostile work environment and discharged in retaliation for complaining about this to her supervisor. These claims were subject to a valid binding arbitration provision in plaintiff's employment contract with defendant PSI Services. Accordingly, the court granted defendant's motion to dismiss and the case proceeded to arbitration before the American Arbitration Association. The arbitrator entered an award in favor of the defendants in March 2000.

Presently before the court is plaintiff's Motion to Vacate the Arbitrator's Decision on the ground that it was rendered in manifest disregard of the law.¹ Where a party

¹Plaintiff clearly invokes the Federal Arbitration Act, citing to 9 U.S.C. § 10. She did not, however, file a proper petition but rather filed a motion at the old civil action number of a case which has long been dismissed. Except for securing a filing fee, however, nothing practical would be achieved by denying the motion on this ground and requiring plaintiff to initiate a new miscellaneous action. The court will treat plaintiff's motion as a petition to vacate pursuant to the FAA.

moves to vacate an arbitral decision on the ground that it was rendered in manifest disregard of federal statutory law, the court has federal question jurisdiction to adjudicate the matter pursuant to 28 U.S.C. § 1331. See Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 28 (2d Cir. 2000) (federal question jurisdiction present when court must review whether arbitration award construing federal law was rendered in manifest disregard of such law).²

Plaintiff alleged that while employed as an administrative assistant by defendant PSI Services II, she was sexually harassed at work by defendant Hughes, a fellow employee. Plaintiff alleged that she was offered the alternative of accepting a demotion or permanent layoff in retaliation for complaining to a supervisor about Mr. Hughes's behavior.

The arbitrator found several instances of inappropriate behavior by Mr. Hughes during the three years of plaintiff's employment with PSI. These included asking plaintiff for a "one night stand"; making vulgar and sexually suggestive comments

²Plaintiff's motion, filed and telefaxed to defendants 89 days after entry of the arbitral decision, was timely under the FAA. See 9 U.S.C. § 12. Defendants, however, suggest that because of a District of Columbia choice of law provision in the arbitration agreement, plaintiff should be held to the 30 day period for presenting such a motion as provided by D.C. Code Ann. § 1-606.7. That provision applies only to cases involving certain public employees of the District and its agencies. See D.C. Code Ann. § 1-602.1. District of Columbia law actually provides 90 days for a private party to file a petition to vacate an arbitral decision. See D.C. Code Ann. § 16-4311(b).

about plaintiff's body; asking plaintiff whether her fiancé sexually satisfied her; grabbing and peering down plaintiff's blouse; and, authoring a menacing note to plaintiff.³

The arbitrator applied the five-prong test for establishing a Title VII hostile work environment claim and found that the harassment had not been pervasive and regular and had not detrimentally affected plaintiff.

As plaintiff acknowledges, the standard for reviewing an arbitration award is one of the most limited known to the law. Manifest disregard of the law is a judicially-created ground for vacating an arbitration award. See Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178 (D.C. Cir. 1991); Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989); Sheet Metal Workers Int'l Assoc. v. Kinney Air Conditioning Co., 756 F.2d 742, 746 (9th Cir. 1985). Its application is severely limited. See United Transp. Union, Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 379 (3d Cir. 1995) ("District courts have very little authority to upset arbitrators' awards"); Roberts & Schaefer Co. v. Local 1846, United Mine Workers of Am., 812 F.2d 883, 885 (3d Cir. 1987) (that decision is "dubious" and one court would not have reached is insufficient to vacate arbitrator's decision"); Merrill

³Mr. Hughes claimed that the note was written in retaliation for a letter written by plaintiff to a PSI client which accused Mr. Hughes of having a relationship with a supervisor.

Lynch, Pierce, Fenner & Smith, Inc., v. Bobker, 808 F.2d 930, 934 (2d Cir. 1986) (judicial inquiry in this area is "extremely limited").

Manifest disregard of the law contemplates more than an error of fact or law. It is reserved for situations where an arbitrator recognizes a clearly governing legal principle and then proceeds to ignore or pay no attention to it. See Remmey v. Painewebber, Inc., 32 F.3d 143, 149 (4th Cir. 1994); Bobker, 808 F.3d at 933; Janney Montgomery Scott Inc. v. Oleckna, 2000 WL 623231, *3 (E.D. Pa. May 15, 2000). Misapplication of the law to the facts is insufficient to constitute a manifest disregard of the law. See ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995) ("Even erroneous interpretations or applications of law will not be disturbed"); Durkin v. Cigna Property & Casualty Corp., 986 F. Supp. 1356, 1358 (D. Kan. 1997) (court's belief that law was applied incorrectly in Title VII hostile work environment case insufficient to overturn arbitral decision). See also Oleckna, 2000 WL 623231, at *3 (arbitrator's decision must exceed bounds of rationality).

To sustain a hostile work environment claim under Title VII, a plaintiff must establish that she suffered intentional discrimination because of her sex; the discrimination was pervasive and regular; the discrimination detrimentally affected plaintiff; the discrimination would detrimentally affect a

reasonable person in plaintiff's position; and, the existence of respondeat superior liability. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

The arbitrator determined that the discrimination was not pervasive and regular. She reasoned that there was no indication that the offensive behavior took place every day, Mr. Hughes was not plaintiff's supervisor and, until the end of plaintiff's employment, the two did not work closely together.

While the existence of a supervisory relationship may enhance the severity of discrimination, such a relationship is not required for harassment to be pervasive. See West v. Philadelphia Elec. Co., 45 F.3d 744, 756 (3d Cir. 1995); Brandau v. Kansas, 968 F. Supp. 1416, 1420 (D. Kan. 1997); Cronin v. United Service Stations, Inc., 809 F. Supp. 922, 931-32 (M.D. Ala. 1992). Harassment need not occur on a daily basis to be pervasive and regular. See Koschoff v. Hendersen, 109 F. Supp. 2d 332, 347 (E.D. Pa. 2000) (several offensive statements made to plaintiff over the course of a year may be pervasive and regular). See also Creamer v. Laidlaw Transit, Inc., 86 F.3d 167, 170 (10th Cir. 1996) (single incident of discrimination, if severe enough, can satisfy pervasiveness test); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (required showings of severity and pervasiveness are in inverse proportion to one another); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 (11th

Cir. 1989) (gravity as well as frequency of incidents is pertinent).

The court believes that the arbitrator misapplied the law regarding pervasiveness to the facts as she found them. As noted, however, this is insufficient to vacate her decision. The arbitrator identified the pertinent governing law and proceeded to analyze the case with reference to that law. While the test for determining the pervasiveness of harassing conduct is admittedly not an exact one, the court has little difficulty in concluding that the highly offensive conduct attributed to Mr. Hughes is sufficient to satisfy that test. Nevertheless, the court cannot conscientiously conclude that the arbitrator literally ignored or paid no attention to applicable legal principles or that her decision exceeded all bounds of rationality.

In any event, there is no legally cognizable ground to set aside the arbitrator's determination, based largely on credibility findings, that plaintiff failed to prove she was detrimentally affected. The arbitrator discounted plaintiff's claim of stress and found that the conduct complained of did not affect her performance, noting that plaintiff received three promotions during the period in question. The arbitrator disbelieved plaintiff's assertion that she initially refrained from complaining about Mr. Hughes' conduct due to fear of

retaliation and that she did eventually complain to her supervisor, Norma Romano. The arbitrator credited the testimony of Ms. Romano to the contrary. The arbitrator found that the choice offered to plaintiff of accepting a lesser position or permanent layoff resulted from a company reorganization and not from retaliation.⁴ Nothing has been presented remotely to show that the arbitrator's findings regarding credibility were irrational or tainted.

Consistent with the foregoing, plaintiff's motion will be denied. An appropriate order will be entered.

⁴The arbitrator's finding that plaintiff in fact had never complained, of course, also doomed her claim of retaliation for complaining. Plaintiff has not argued that the retaliation claim was resolved with a manifest disregard of applicable law.

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O R D E R

AND NOW, this day of January, 2001, upon
consideration of plaintiff's Motion to Vacate Arbitrator's
Decision (Doc. #26) and defendants' response thereto, consistent
with the accompanying memorandum, **IT IS HEREBY ORDERED** that said
Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.